

December 21, 2018

Howard J. Symons
Tel +1 202 639 6078
HSymons@jenner.com

BY ELECTRONIC DELIVERY

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20054

Re: Notice of Ex Parte Presentation

**Petition of Charter Communications, Inc., for a Determination of Effective
Competition in 32 Massachusetts Communities and Kauai, HI**

MB Docket No. 18-283; CSR No. 8965-E

Dear Ms. Dortch:

On December 19, 2018, Maureen O’Connell of Charter Communications, Inc. (“Charter”) and the undersigned on behalf of Charter met with Michelle Carey, Martha Heller, Holly Saurer, Brendan Murray, Diana Sokolow, and Steven Broeckert of the Media Bureau, and Susan Aaron and David Konczal of the Office of General Counsel regarding the above-captioned matter.

During the meeting, the Charter representatives explained that the need for a broadband connection to receive DIRECTV NOW does not disqualify DIRECTV NOW from satisfying the LEC Test. We noted that, while one purpose of the Telecommunications Act of 1996 was to promote facilities-based competition between cable operators and local telephone companies, Congress took a broader approach in the LEC Test by specifying that it can be satisfied by the offering of video programming by a LEC or LEC affiliate “by any means” other than direct-to-home satellite services. We noted that the legislative history of the LEC Test supports this interpretation, as Charter explained in its Reply to Oppositions.¹ We also pointed out that more than 80 percent of households in Massachusetts (specifically, 85.5%) and Hawaii (83.2%) had broadband subscriptions in 2016, and that number has likely risen since then. In addition, nearly

¹ See Charter Communications, Inc. Reply to Oppositions, MB Docket No. 18-283, CSR-8965-E, at 12 n. 40 (Nov. 19, 2018) (“Charter Reply”).

all households in Massachusetts and Hawaii have a choice of broadband providers that offer downstream speeds of at least 25 Mbps.²

We also explained that even customers who do not choose to subscribe to DIRECTV NOW benefit from the availability of that service because competition from a LEC or LEC affiliate would impose a competitive check on the rates that cable services charge. We cautioned against imputing a penetration requirement on the LEC Test, noting that Congress explicitly did not extend that aspect of the other definitions of effective competition to the LEC Test.

We also noted that while the LEC Test can only be satisfied by a multichannel video programming distributor (“MVPD”) “using the facilities of” a LEC or LEC affiliate, that provision is not a generally applicable facilities requirement. Rather, we explained that the phrase “using the facilities of such carrier or its affiliate” on its face applies only to MVPDs, including providers unaffiliated with a LEC—not to LECs or their affiliates in every instance. In essence, the reference to facilities defines a specialized group of MVPDs whose service would constitute effective competition without regard to the numerical requirements applicable to the other MVPD effective competition tests. Finally, we noted that Congress directed the Commission to define “comparable” video programming by reference to the Commission’s rule in effect in 1996, which does not require physical channels,³ and that adding facilities or other requirements to what is meant by comparability under that rule would be fundamentally at odds with the lesser burdens of the LEC Test, *i.e.*, its lack of a subscribership requirement, as well as with the “by any means” standard and the absence of any reference to channels in the statutory text.

Please contact the undersigned if you have any questions about this matter.

Sincerely,

/s/ Howard J. Symons

Howard J. Symons

² See *id.* at 18, 19 n.70.

³ See Charter Reply at 7-8; see also Letter from Cathy Carpino, Assistant Vice President-Senior Legal Counsel, AT&T Services, Inc., to Marlene H. Dortch, Secretary, FCC, MB Docket No. 18-283, at 3 (filed Dec. 7, 2018); Letter from Rick Chesson, Senior Vice President, Law & Regulatory Policy, NCTA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 18-283, CSR-8965-E, at 3 (filed Nov. 30, 2018).

Marlene H. Dortch
December 21, 2018
Page 3

cc: Michelle Carey
Martha Heller
Holly Saurer
Brendan Murray
Diana Sokolow
Steven Broeckert
Susan Aaron
David Konczal